No. 90-199 (2)

In The

Supreme Court of the United States

October Term, 1990

TELEDYNE, INC.,

Petitioner,

v.

MARJORIE DATSKOW, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the petitioner advanced any special or important reason warranting review of this case?

The respondents respectfully answer and argue "No".

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Respondents, Marjorie Datskow and Grossair, Inc., respectfully request that the Court deny the Petition for Writ of Certiorari.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at 899 F.2d 1298 (2d Cir. 1990). It is reprinted in the Appendix attached to the

Petition. (App. 4a-16a). The per curiam opinion of the Court of Appeals on petition for rehearing is unofficially reported at 1990 U.S. App. LEXIS 4535 (2d Cir. May 2, 1990). It is reprinted in the Appendix attached to the Petition. (App. 1a-3a).

The decision and order of the district court granting petitioner's motion to dismiss for lack of personal jurisdiction, improper service, and statute of limitations, and denying respondents' motion for leave to amend the complaint to correct the name of the defendant is reprinted in the Appendix, (App. 17a-31a), as is the decision and order of the district court denying respondents' motion for reconsideration. (App. 32a-34a). Neither of the district court's opinions have been reported.

JURISDICTION

The jurisdiction of the district court was invoked originally under 28 U.S.C. § 1332 (1983), due to the diversity of citizenship of the parties, the amount in controversy being certified in excess of $10,000, the jurisdictional amount in effect at the time the action was commenced, exclusive of interest and costs.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1) (1983).

STATEMENT OF THE CASE

On November 22, 1988, Marjorie Datskow and Grossair, Inc.[1] filed a complaint in the United States District Court for the Western District of New York at Rochester. The complaint alleged that on November 26, 1986, a Beechcraft Debonair single-engine aircraft suffered engine failure and crashed while on approach to an airport in Winston-Salem, North Carolina, killing all persons on board the plane. The dead included Robert C. Gross, his wife, Susan, and their two small children, Michael and David. The plane, which was owned by Grossair, Inc., was destroyed in the post-impact fire.

The aircraft engine was manufactured and remanufactured by Teledyne Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc. (TCM), which maintains an aircraft manufacturing plant in Mobile, Alabama. Teledyne Industries, Inc. is a wholly owned subsidiary of Teledyne, Inc., a holding company with thirty-nine subsidiaries, most of which use the word "Teledyne" in their corporate names. The mailing address for TCM is Box 90, Mobile, Alabama 36601. Suit was brought against the engine manufacturer by Marjorie Datskow (Datskow), a citizen of Pennsylvania, as executrix and administratrix of the decedents' estates, and by Grossair, Inc. (Grossair). The defendant was identified in the caption and body of the complaint as "Teledyne, Inc.,

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[1] Grossair, Inc. was a stock corporation formerly organized and existing under the laws of the Commonwealth of Virginia. Its corporate existence was terminated on September 1, 1987.

Continental Products Division" located at "Box 90, Mobile, Alabama 36601."

The complaint alleged causes of action for negligence, strict product liability, fraud, and breach of warranty. Datskow made claims under New York's wrongful death and survival statutes, and Grossair sought to recover for the total loss of the aircraft. The limitations period for a property damage action and for a survival action is three years under New York law, N.Y. Civ. Prac. Law & R. § 214 (McKinney 1990), whereas a wrongful death action must be commenced within two years. N.Y. Est. Powers & Trusts Law § 5-4.1(1) (McKinney Supp. 1990). Under New York law, service of the summons, not filing of the complaint, is the means by which an action is commenced and the statute of limitations tolled. N.Y. Civ. Prac. Law & Rule § 304 (McKinney 1990). In addition, New York law extends the normal statute of limitations for sixty days under certain circumstances. N.Y. Civ. Prac. Law & R. § 203(b)(5) (McKinney 1990).

On December 1, 1988, Datskow and Grossair mailed a copy of the complaint and summons to the defendant, as identified in the caption, by certified mail, return receipt requested, and by first class mail. A receipt was returned, acknowledging receipt of the summons and complaint on December 5, 1988 in Mobile, Alabama. On December 23, 1988, Teledyne filed an answer raising fifteen affirmative defenses, including lack of personal jurisdiction, lack of proper service, and expiration of the applicable statutes of limitations. On January 17, 1989, counsel for the parties attended a Rule 16 scheduling conference before a United States magistrate, at which time the scheduling of discovery and motions, as well as the possibility of settlement,

were discussed and a scheduling order entered. No mention was made at the conference that TCM was in fact a division of Teledyne Industries, Inc., rather than Teledyne, Inc. as named in the complaint, that either corporation had not been properly served with the complaint, that there was a colorable claim that any of the causes of action were barred by the applicable statutes of limitations, or that defense counsel had any intention of filing a dispositive motion on any of these issues. Defense counsel also did not alert the court at the conference of the jurisdictional defect due to the claimed improper service of process.

On April 21, 1989, Teledyne moved for summary judgment and to dismiss on the grounds of lack of personal jurisdiction, lack of proper service, and statute of limitations, claiming that Datskow had sued the wrong defendant and that the entire action was time-barred by the two year wrongful death statute of limitations. Teledyne conceded that the aircraft engine was manufactured and remanufactured by TCM, but claimed that this entity had not been sued. On May 22, 1989, Datskow and Grossair moved for leave to amend the complaint to change the identification of the defendant to "Teledyne Continental Motors Aircraft Products, a Division of Teledyne Industries, Inc."

On August 9, 1989, without holding an evidentiary hearing, the district court granted Teledyne's motion to dismiss and denied the cross-motion based on the premise that the wrong corporation, the holding company, Teledyne, Inc., rather than Teledyne Industries, Inc., had been sued. The district court then found that Teledyne, Inc. was not amenable to the personal jurisdiction of the

court, ruled that service of process was improper because mail service is ineffective beyond the territorial limits of the state in which the district court sits absent a state law provision providing for extraterritorial mail service, and held that the entire action was time-barred. (App. 22a-28a). The district court also concluded that the sixty day tolling provision of section 203(b)(5) of the New York Civil Practice Law and Rules did not apply because Teledyne, Inc. does not reside in New York or do business in that state. (App. 26a). The district court then dismissed the entire complaint as time-barred, and judgment was entered in favor of Teledyne.

Datskow and Grossair filed a motion for reconsideration, pointing out that the statute of limitations for the survival action and property damage action had not yet run, and requested that the district court reconsider its dismissal of the entire action. Although the district court recognized that the entire action was not time-barred, it denied the motion for reconsideration and directed Datskow and Grossair to commence a second lawsuit, and to re-serve the defendant with process. (App. 32a-34a). Datskow and Grossair filed a timely notice of appeal.

On March 23, 1990, a unanimous panel of the Court of Appeals for the Second Circuit reversed and remanded for further proceedings, "including allowing plaintiffs to amend the complaint to designate properly the name of the defendant, Teledyne Industries, Inc." (App. 16a). Based on undisputed facts of record, the Court of Appeals held, in a nutshell, that the correct party – the engine manufacturer, an unincorporated division of Teledyne Industries – had been sued, and that the summons

and complaint had been served by mail at its manufacturing plant in Mobile, Alabama. The Second Circuit thus determined, based upon its application of state law, that the correct defendant had received actual notice of the lawsuit within the limitations period provided by New York law.

In its opinion, the Second Circuit observed that "the line between naming the wrong defendant and mislabeling the right one must be drawn in the context of the nomenclature created by the defendant and the labeling undertaken by plaintiffs assessed against that context . . . . " (App. 9a). After listing the various ways that the defendant was identified in the complaint, the Court of Appeals held that the "plaintiffs' complaint sufficiently alerted Teledyne Industries, Inc. that it was the corporation being sued so this case may be characterized as one of mislabeling." (App. 10a). The Second Circuit, noting that the parties did not dispute that Teledyne Industries, the parent company of TCM, was authorized to do business in New York, also concluded that personal jurisdiction was proper. (App. 10a).

The Second Circuit next considered the issue of service of process, holding that the territorial limits of Rule 4(f) apply to Rule 4(c) mail service. (App. 11a). The Second Circuit noted that, at the time the summons and complaint were sent by mail to TCM, New York law did not permit mail service upon corporations,[2] yet concluded that even though plaintiffs' mail service was not

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[2] New York now permits mail service on domestic and foreign corporations. *See* N.Y. Civ. Prac. Law & R. § 312-a (McKinney 1990).

proper under Rule 4, "under all the circumstances, . . . defendant's conduct bars it from complaining about the defective form of service." (App. 12a). In particular, the Court of Appeals stressed that the "amenability of Teledyne Industries, Inc. to the jurisdiction of the Western District is clear, and defendant is complaining about a defect in the form of service, one that could have been readily cured during the limitations period if defendant had promptly complained." (App. 12a).

Finally, the Second Circuit determined that Datskow's wrongful death claims were not time-barred. The Court of Appeals recognized that "[s]ervice of process must be timely made when a state statute of limitations specifies that service is necessary to toll a limitations period, *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530 (1949), but federal law may determine when service has been made, *Hanna v. Plumer*, 380 U.S. 460 (1965)." (App. 13a-14a). The Second Circuit, citing four decades of New York district court opinions interpreting section 203(b)(5) of the New York Civil Practice Law and Rules, which affords an extra sixty days beyond the normal limitations period when a summons is delivered to a designated official within the normal limitations period and the summons is served within the sixty day period, held that diversity plaintiffs are entitled to the benefits of section 203(b)(5) and that the clerk of a district court may serve as the depository for a summons. (App. 12a-15a). The Court of Appeals further concluded that "[t]he same circumstances that sufficed to constitute a waiver of service for purposes of personal jurisdiction also waive

service for purposes of strict compliance with section 203(b)(5)." (App. 15a).

Petitioner filed a petition for rehearing and suggestion for a rehearing en banc, contending that the Court of Appeals improperly permitted amendment of the complaint contrary to the requirements of Rule 15(c) of the Federal Rules of Civil Procedure. On May 2, 1990, the Court of Appeals, per curiam, denied the petition for rehearing, and rejected petitioner's contention that the notice it received arrived beyond the relevant two year statute of limitations. The Court of Appeals, as it did in its original opinion, emphasized that there is "no dispute that Teledyne Industries, Inc. received notice within the 60-day extension period [provided by section 203(b)(5) of the New York Civil Practice Law & Rules]." (App. 2a). The Court of Appeals also rejected petitioner's claim that reliance on the sixty day tolling period to validate the notice is precluded by *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986). (App. 2a). The Second Circuit distinguished the present action from *Schiavone*, in part, by noting that "plaintiffs are not seeking to use Rule 4(j)'s 120-day time period for service to validate their Rule 15(c) notice to Teledyne Industries; they are relying on the 60-day extension period that New York adds to its own limitations period," (App. 3a), and held that "the notice here satisfies Rule 15(c), and the amendment will relate back to the date of the original complaint." (App. 3a). On May 24, 1990, the Second Circuit summarily denied petitioner's suggestion for a rehearing en banc, advising that none of the judges of the Second Circuit requested that a vote be taken on the suggestion for

rehearing en banc. The order is reprinted in the supplemental appendix attached to this brief. (Supp. App. 1a).

The Second Circuit issued a mandate relinquishing jurisdiction to the district court on June 8, 1990. Datskow and Grossair filed an amended complaint correcting the name of the defendant to "Teledyne Industries, Inc." on June 19, 1990.

REASONS FOR DENYING THE WRIT

INTRODUCTION

Petitioner's argument for granting the Writ can be categorized as follows:

First, petitioner argues that the Court of Appeals' decision, in its review of the district court's dismissal of the complaint pursuant to Rule 12 of the Federal Rules of Civil Procedure, is at odds with recent opinions of the Court addressing the standard of review to be applied in connection with Rule 52(a) fact finding;

Second, petitioner argues that there is a conflict among the courts of appeals concerning the appropriate standard of review to be applied with respect to the waiver of an arbitration defense, which petitioner claims is analogous to the issue of the standard of review to be applied to the waiver of the defense of service of process;

Third, petitioner argues that the Court of Appeals' holding that petitioner waived its jurisdictional defense by virtue of its failure to alert the district court at a Rule 16 scheduling conference that the court lacked personal jurisdiction is so shocking as to constitute a departure

from the accepted and usual course of proceedings requiring the Court's intervention; and

Fourth, petitioner argues that the Court of Appeals did not apply the proper standard of review with respect to its review of the district court's refusal to allow respondents leave to amend the complaint to correct the identification of the defendant, and that its conclusion that the named defendant had actual notice of the lawsuit within the limitations period provided by the applicable state law is at odds with the Court's decision in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986).

None of these arguments, nor the authority advanced by petitioner in support therefor, constitute the "special and important reasons" warranting review of this case. Sup. Ct. R. 10.1.

I. THE SECOND CIRCUIT'S DECISION THAT THERE WAS WAIVER OF THE DEFENSE OF INSUFFICIENT SERVICE OF PROCESS DOES NOT CONFLICT WITH ANY APPLICABLE DECISION OF THE COURT.

Petitioner inaccurately suggests that the decision of the Court of Appeals for the Second Circuit conflicts with the decisions of the Court in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), *Amadeo v. Zant*, 486 U.S. 214 (1988), and *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990). Petitioner also argues that these decisions recognize that the principles of appellate review embodied in Rule 52(a) apply to the review of the district court's determination concerning waiver of a Rule 12 defense, which should be

reviewed under a "deference standard." This argument does not merit review by the Court.

These three decisions are factually and legally distinguishable from the case at bar. First, none of the cases cited dealt with the standard of review of the Rule 12 dismissal of a lawsuit. For example, in *Anderson v. Bessemer City*, 470 U.S. 564 (1985), a civil rights action, the district court, after hearing two days of testimony, issued a memorandum opinion setting forth its findings that the plaintiff was entitled to judgment because she had been denied a position on account of her sex, and asked the plaintiff's counsel to submit proposed findings of fact and conclusions of law expounding upon those set forth in the court's memorandum. Similarly, *Amadeo v. Zant*, 486 U.S. 214 (1988), also relied upon by petitioner, was a habeas corpus proceeding which also involved an evidentiary hearing by the district court. Finally, in *Cooter & Gell v. Hartmarx Corp.*, 110 S. Ct. 2447 (1990), the issue was the appropriate standard of review to be employed in determining the propriety of the district court's imposition of Rule 11 sanctions. The Court, looking at the language of Rule 11 and its policy goals, concluded that an abuse of discretion standard was appropriate in reviewing all aspects of a district court's imposition of Rule 11 sanctions. *Id.* at 2461.

Second, by its express terms, Rule 52(a) applies only to "actions tried upon the facts without a jury or with an advisory jury. . . . " Fed. R. Civ. P. 52(a). Indeed, Rule 52 findings of fact and conclusions of law are "unnecessary on decisions of motions decided under Rules 12 or 56," *id.*, although a district court may do so. The district court here, however, did not set forth Rule 52(a) findings of fact

and conclusions of law in either decision and order. (App. 32a-34a; 17a-31a).

More importantly, even if Rule 52(a) could be said to govern the scope of appellate review herein, there still is no need for review by the Court. The critical facts relating to service of process and to defense counsel's conduct at the scheduling conference were not in dispute. Moreover, the district court, which addressed the issue of waiver in a footnote, compared the six month gap between the commencement of the lawsuit in the present action and the filing of a motion to dismiss for improper service with the two year and three and one-half year delays, respectively, in *Vozeh v. Good Samaritan Hospital*, 84 F.R.D. 143 (S.D.N.Y. 1979) and *Burton v. Northern Dutchess Hospital*, 106 F.R.D. 477 (S.D.N.Y. 1985), cases cited by respondents. (App. 18a). Thus, the district court's ruling that there was no waiver was a conclusion of law reached after review of other precedent and application of legal precepts in those cases to undisputed facts. The Court of Appeals did not disturb the factual elements of the district court's determination with respect to the defense of insufficient service of process, but corrected its erroneous legal conclusion that the defense had not been waived.

The Court has recognized that, although Rule 52(a) applies to findings of fact, "Rule 52(a) does not inhibit an appellate court's power to correct errors of law, including those that may infect a so-called mixed finding of law and fact, or a finding of fact that is predicated on a misunderstanding of the governing rule of law." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 501, *reh'g denied*, 467 U.S. 1267 (1984) (citations omitted). *Cf. Cooter & Gell*, 110 S. Ct. at 2459 (fact-dependent

legal standard mandated by Rule 11 does not preclude court of appeals from correcting district court's legal errors). Consequently, even if the determination of waiver of a Rule 12 defense by conduct could be construed as involving a mixed question of law and fact, the Court of Appeals was empowered to correct the district court's errors of law, which is totally consistent with the Court's teachings.

In sum, the Court of Appeals correctly applied the precedents of the Court in its review of the district court's dismissal of the lawsuit.

II. THIS CASE DOES NOT INVOLVE AN ISSUE IN WHICH THERE HAS BEEN A CONFLICT AMONG THE COURTS OF APPEALS ON THE SAME MATTER.

Rule 10.1 of the Rules of the Supreme Court of the United States provides that the Court will consider exercising jurisdiction on writ of certiorari "[w]hen a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals *on the same matter*. . . ." S. Ct. R. 10.1(a) (emphasis added). Petitioner claims that there is a dispute among the circuits concerning the standard of review to be applied with respect to the waiver of the defense of arbitration, which petitioner argues is analogous to the issue of waiver in the present matter.

The waiver of an arbitration defense in civil litigation is a totally different issue from the questions presented in the case at bar. Any claimed conflict among the circuits concerning the proper standard of review for waiver of

arbitration notwithstanding, there is no dispute *on the same issue* warranting the Court's intervention. Furthermore, even if the issue of waiver of an arbitration defense is analogous to the issue of waiver presented here, the Second Circuit's decision did not substitute its marshalling of the facts for that of the district court, but simply corrected the lower court's error of law, which makes any such divergence among the circuits a nonissue.

Petitioner's attempt to shoestring an argument using cases dealing with unrelated matters is meritless and simply not applicable legally or factually to the present action.

III. THE COURT OF APPEALS' DETERMINATION THAT THERE WAS WAIVER OF A JURISDICTIONAL DEFENSE BY CONDUCT IS BY NO MEANS A DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS REQUIRING THE COURT'S REVIEW.

Petitioner argues next that the Court of Appeals' ruling that, by virtue of its conduct at the scheduling conference, Teledyne waived its right to complain about the technical defects in service constitutes a "startling" departure from the accepted and usual course of judicial proceedings, requiring the exercise of the Court's power of supervision. To the contrary, the Second Circuit was troubled by petitioner's conduct "under all the circumstances," including the fact that petitioner hid behind the "Teledyne" name, as well as the fact that defense counsel never apprised the magistrate at the Rule 16 pretrial conference that he claimed that the wrong party had been sued, that service of process was claimed to be defective,

or that, by virtue of the claimed defective service and failure to properly commence the action, the court lacked personal jurisdiction over Teledyne.

The Court has recognized that the defense of personal jurisdiction is a privileged defense which may be waived by virtue of a defendant's conduct. *See Neirbo Co. v. Bethlehem Shipbuilding Corp.*, 308 U.S. 165, 168 (1939). In consonance with this principle, Rule 12 allows a defendant the option of raising its defenses in its answer or in a pre-answer motion to dismiss. Fed. R. Civ. P. 12(b),(h)(1). Here, petitioner complied literally with Rule 12 by interposing these defenses in its answer. Nevertheless, the defense is not preserved in perpetuity but must be raised by motion. A respected commentator, examining Rule 12(g), which requires all Rule 12 defenses to be raised at one time in a single motion, has recognized that Rule 12 "contemplates the presentation of an omnibus pre-answer motion in which defendant advances every available Rule 12 defense and objection he may have that is assertable by motion. . . ." 5A C. Wright & A. Miller, *Federal Practice & Procedure Civil 2d* § 1384, at 726 (1990). The purpose of Rule 12 is to "eliminate unnecessary delay at the pleading stage." *Id.* (citations omitted).

Similarly, Rule 16, governing pretrial conferences, is intended to "expedit[e] the disposition of the action" and to "discourag[e] wasteful pretrial activities." Fed. R. Civ. P. 16(a)(1),(3). Defense counsel, by his silence, has prolonged the litigation and caused needless pretrial and appellate activities. The reason for counsel's silence at the conference, as well as the decision not to raise the defenses by pre-answer motion, is simple; had petitioner done so, the defects in service and in the naming of the

defendant could have been corrected and the action properly commenced before the expiration of the statute of limitations.

Petitioner does not claim that defense counsel did not know at the conference that defects in the pleadings or in service of process existed, nor does it claim that discovery was necessary to investigate whether to pursue these defenses by Rule 12 motion. Rather, petitioner contends that counsel had no obligation, as an officer of the court, to alert the magistrate to matters which would have changed the entire complexion of the pretrial conference. It is this position, and not the Second Circuit's refusal to reward petitioner for its lack of candor before the district court, that truly is startling. The zealous advocacy of a client does not permit an advocate to mislead a judicial body, by silence or otherwise.

As a zealous advocate, a lawyer has a duty not only to the client, but to the legal system, to represent his client "within the bounds of the law." Model Code of Professional Responsibility EC 7-1 (1970), *reprinted in* N.Y. Jud. Law App. (McKinney 1975). *See also* EC 7-19 (duty of a lawyer to his client and to the legal system are the same: "to represent his client zealously within the bounds of the law"). It is axiomatic that "[i]n order to function properly, our adjudicative process requires an informed, impartial tribunal capable of administering justice promptly and efficiently. . . . " EC 7-20.

Here, by virtue of defense counsel's silence, the district court was deprived of all of the facts necessary to administer justice promptly and efficiently. The issue is not whether counsel has a legal obligation to apprise an

adversary of a dispositive issue, as petitioner implies, but whether counsel has an obligation to the judicial process to alert a court of limited jurisdiction to a potential roadblock to its ability to exercise jurisdiction at all. Further, contrary to the assertions in petitioner's brief, there would have been no prejudice to petitioner had counsel been candid at the scheduling conference because Teledyne Industries, on whose behalf defense counsel appeared, not only does business in New York, but had actual notice of the lawsuit in the governing limitations period and was able to prepare and prosecute its defense. Rather, justice would have been done, and it was done when the Court of Appeals refused to allow petitioner to benefit from its silence and subterfuge. There is, accordingly, no need for the Court to exercise its supervisory powers in this instance.

IV. THE COURT OF APPEALS APPLIED THE CORRECT STANDARD OF REVIEW TO THE DISTRICT COURT'S REFUSAL TO ALLOW TO LEAVE TO AMEND UNDER RULE 15(c), AND ITS DECISION IS CONSISTENT WITH THE COURT'S DECISION IN *SCHIAVONE V. FORTUNE, AKA TIME, INC.*, 471 U.S. 21 (1986).

Petitioner's final argument concerns respondents' motion for leave to amend the complaint pursuant to Rule 15(c) of the Federal Rules of Civil Procedure. Petitioner claims that the Court of Appeals did not find abuse of discretion by the district court, and, further, that this decision is inconsistent with the Court's decision in *Schiavone v. Fortune, aka Time, Inc.*, 477 U.S. 21 (1986).

It is undisputed that the appropriate standard of review of the district court's refusal to allow leave to amend is abuse of discretion.[3] Though the Second Circuit did not expressly find that the district court's refusal to permit leave to amend was an abuse of its discretion, a finding of abuse of discretion is implicit in the Second Circuit's holding that the proper defendant had actual notice of the lawsuit within the applicable statute of limitations, the prerequisite for leave to amend under Rule 15(c).

The Second Circuit's finding of relation back easily is reconciled with *Schiavone*, where the Court rejected the concept of notice received after the expiration of the statute of limitations but received within the 120 day period for service of process provided by Rule 4(j). 477 U.S. at 30. As the Second Circuit recognized, respondents' Rule 15(c) notice to Teledyne Industries was validated not by Rule 4(j) but by the sixty day extension period New York adds to its own limitations period. (App. 3a). Section 203(b)(5) is not, as the petitioner repeatedly and incorrectly suggests, a service of process provision, but a statutory extension of time in which to *commence* an action by service of the summons. N.Y. Civ. Prac. Law & R. §§ 203(b)(5), 304 (McKinney 1990). In any event, the three year statute of limitations for the survival action and property damage action did not run until November

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[3] Respondents apprised the Court of Appeals in their brief that the standard of review with respect to the lower court's refusal to grant the motion for leave to amend is abuse of discretion. Teledyne, on the other hand, did not advise the Court of Appeals of the appropriate standard of review for this or any other issue.

26, 1989, and Teledyne Industries most certainly had actual notice of the lawsuit within this limitations period.

Not only was the Second Circuit's decision consistent with the teachings of *Schiavone*, but in view of the proposed amendments to Rule 15(c), which will overturn *Schiavone* by recognizing a federal 120 day service period extending the limitation period for purposes of providing Rule 15(c) notice, in addition to state notice provisions, *see* Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure and Federal Rules of Civil Procedure, Proposed Rule 15(c)(1),(3), 127 F.R.D. 237, 309-12 (1989), there is no compelling reason for the Court to address the Rule 15(c) issue here.

This argument is yet another attempt to circumvent the holding of the Court of Appeals, and to prolong this already protracted litigation. Without complaint or rancor, respondents respectfully state that review by the Court is unwarranted and the Court should decline to exercise its certiorari jurisdiction.

CONCLUSION

For the reasons set forth above, respondents respectfully request that this Honorable Court deny the Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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Dated: August 31, 1990

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 24 day of May, one thousand nine hundred and ninety

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MARJORIE DATSKOW, Executrix of the Estates of Robert C. Gross and Susan C. Gross, Deceased and Administratrix of the Estates of Michael and David Gross, Deceased and GROSSAIR, INC.,
Plaintiff-Appellants,

v

TELEDYNE, INC., Continental Products Division,
Defendant-Appellee.

DOCKET NUMBER

89-7916

(FILED MAY 24 1990)

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by defendant-appellee, Teledyne Inc.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

by /s/ Tina Eve Brier
Chief Deputy Clerk